ND-2020-30EC

PUBLIC VERSION

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T NORTH CAROLINA and d/b/a AT&T SOUTH CAROLINA,	)	
Complainant,	)	**Proceeding No.: 20-293** **Bureau ID No.: EB-20-MD-004**
v.	)	
DUKE ENERGY PROGRESS, LLC,	)	
Defendant.	)	

To: The Enforcement Bureau

DUKE ENERGY PROGRESS, LLC'S REPLY TO
AT&T's OPPOSITION TO PETITION FOR RECONSIDERATION

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November 8, 2021

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PUBLIC VERSION

Duke Energy Progress, LLC ("DEP") submits this reply to AT&T's opposition to DEP's October 21, 2021 petition for reconsideration in the above-captioned proceeding.

ARGUMENT

I. AT&T Failed to Establish that It Is Entitled to Relief Under the 2011 Order.

In analyzing AT&T's claim under the 2011 Order, the Bureau found that: (1) the parties' joint use agreement ("JUA") constitutes an "existing" or "historical" agreement;[1] and (2) the JUA provides AT&T with benefits that give AT&T a competitive advantage over CLEC and CATV attachers on the same poles.[2] Based on these findings, the Bureau should have applied the legal standard articulated in the 2011 Order and the *Verizon Florida Decision* to determine whether AT&T was entitled to relief for the period governed by the 2011 Order.[3] Under this standard, AT&T is required to demonstrate that the "monetary value" of the benefits under the JUA does not justify the difference between the JUA rate and the Old Telecom Rate.[4] AT&T failed to produce any evidence quantifying the "monetary value" of the JUA benefits.[5] Thus, the Bureau erred in finding that AT&T was entitled to relief for the period governed by the 2011 Order.

The foregoing argument is the centerpiece of DEP's Petition.[6] Yet, AT&T devotes little

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[1] *See* Order at ¶¶ 9, 36 n.109; *see also Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240, 5344-37 at ¶¶ 216-17 (Apr. 7, 2011) (the "*2011 Order*").

[2] *See* Order at ¶¶ 16-33, 41.

[3] *See Verizon Fla. LLC v. Fla. Power and Light Co.*, Memorandum Opinion and Order, Docket No. 14-216, 30 FCC Rcd 1140, 1149-50 at ¶ 24 (Feb. 11, 2015) (the "*Verizon Florida Decision*"); *see also* 2011 Order, 26 FCC Rcd at 5333-37, ¶¶ 214-19 (explaining that ILECs bear the burden of demonstrating that the "rates" they pay under joint use agreements are not "just and reasonable").

[4] *See Verizon Florida Decision*, 30 FCC Rcd at 1149-50 at ¶ 24.

[5] *See* Order at ¶ 47 (finding that AT&T did not provide "a credible valuation of the advantages that AT&T receives under the JUA").

[6] *See* DEP's Petition at 1-4.

more than a page in its opposition to this threshold issue. Instead of confronting its burden of proof under the 2011 Order and the *Verizon Florida Decision*, AT&T offers-up four arguments that are incorrect, irrelevant or both. First, AT&T claims:

> The Commission did not adopt this standard of review.... Rather, the Commission has always placed the burden on the pole owner—here, Duke Progress—to justify charging a rate higher than the regulated rate....[7]

AT&T is just plain wrong. The *Verizon Florida Decision*, which addressed an ILEC complaint involving an "existing" joint use agreement, clearly states that the burden of proof under the 2011 Order lies with the ILEC to demonstrate that its "rate" is not just and reasonable.[8] AT&T attempts to distinguish the *Verizon Florida Decision* by arguing that "quantification was requested based on a finding that the ILEC 'concede[d] that it received and continues to receive benefits under the Agreement that are not provided to other attachers.'"[9] This is a meaningless distinction. Whether it be a concession or a legal finding that an ILEC receives material benefits under an "existing" joint use agreement, the legal standard under the *Verizon Florida Decision* remains the same: the ILEC is required to demonstrate that the "monetary value" of those benefits do not justify the "rate" under the joint use agreement.

Second, AT&T argues:

> But the *Bureau Order* **did** treat the JUA as an "existing" agreement and found that it satisfies the "threshold" requirements for review of such agreements. It also strictly adhered to precedent when it described the 2011 *Order's* adoption of the old telecom rate as a "reference point" and applied that "reference point" here.[10]

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[7] AT&T's Opposition at 8 (italics in original).

[8] *Verizon Florida Decision*, 30 FCC Rcd at 1149-50 at ¶ 24; *see also id. at* 1140, ¶ 2 ("[W]e find that Verizon has not met its burden of proving that the rates established in a 1975 Joint Use Agreement...are unjust and unreasonable in violation of Section 224(b)(1) of the Communications act of 1934...."); *see also* 47 C.F.R. § 1.1424 (2011) (placing burden of proof on the ILEC).

[9] AT&T's Opposition at 8 n.37.

[10] *See id.* at 9-10 (italics and bold emphasis in original).

AT&T's argument completely misses the point. As explained in the Petition, the 2011 Order recognized two types of joint use agreements: "existing" (a/k/a "historical") and "new" agreements.[11] Each is governed by a different standard. For "new" agreements, the Commission explained that it would look to the Old Telecom Rate "as a reference point in complaint proceedings."[12] As if there was any doubt in the 2011 Order itself, the *Verizon Florida Decision* makes clear that a **different** standard applies to "existing" agreements:

> In support of applying the Old Telecom Rate, Verizon cites the *Order*'s statement that the Commission would consider the Old Telecom Rate "as a reference point" when determining a just and reasonable attachment rate for a "*new agreement*" between an incumbent LEC and a utility. The agreement at issue here is not a new agreement. It is "an historical joint use agreement," which the Commission repeatedly distinguished from "new agreements."[13]

As explained above, the legal standard for disputes involving "existing" agreements requires the ILEC to demonstrate that the "monetary value" of the benefits it receives under its joint use agreement does not justify the "rate" it pays under the joint use agreement. The Bureau failed to apply this legal standard to AT&T's claim and erroneously grafted the Old Telecom Rate as a "reference point" for reviewing the parties' "existing" JUA.[14] AT&T's Opposition fails to address the separate legal standard for "existing" agreements under the *Verizon Florida Decision*. Instead, AT&T incorrectly claims that the Bureau "strictly adhered to precedent when it...applied [the Old Telecom Rate as a] 'reference point' here."[15]

Third, in response to DEP's argument that AT&T failed to demonstrate a genuine inability

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[11] *See* DEP's Petition at 4-6; 2011 Order, 26 FCC Rcd at 5334-37, ¶¶ 216-17.

[12] *See* 2011 Order, 26 FCC Rcd at 5336-37, ¶ 218.

[13] *Verizon Florida Decision*, 30 FCC Rcd at 1149, ¶ 23 (italics in original).

[14] In fact, the Bureau failed to address the *Verizon Florida Decision* at all in its Order.

[15] AT&T's Opposition at 9-10. Like the Bureau, AT&T completely ignored the *Verizon Florida Decision*. AT&T's failure to address the *Verizon Florida Decision* speaks volumes, as the *Verizon Florida Decision* lies at the heart of DEP's argument on this issue.

to terminate the JUA and obtain a new arrangement, AT&T argues:

> Duke Progress does not claim that it *would* have lowered its rates had AT&T asked to negotiate sooner, and the record refutes any such claim. The parties engaged in "protracted negotiations" that failed to resolve this case—not because of when they began—but because Duke Progress rejected the Commission's jurisdiction, precedent and rate reforms....[16]

AT&T once again misses the mark. The timing of AT&T's first request for a new arrangement is important because it is inextricably intertwined with the substance of its request. AT&T's first request to renegotiate the JUA came **after** the effective date of the 2018 Order, and AT&T has dogmatically insisted that it was entitled to the New Telecom Rate (for the entire period in dispute) and maintained throughout this proceeding that it was DEP's burden to demonstrate otherwise.[17] The entire point of DEP's argument is that the conversation would have been entirely different had AT&T sought to "obtain a new arrangement" prior to the effective date of the 2018 Order and under the guidance of the 2011 Order.[18]

AT&T's argument also evidences a general misunderstanding of the legal standard under the 2011 Order—i.e., that it was AT&T's burden to demonstrate that it was entitled to relief during period governed by the 2011 Order. Before the Commission will review "existing" joint use agreements, ILECs are required to meet the threshold burden of demonstrating that they "genuinely lack[] the ability to terminate an existing agreement and obtain a new arrangement."[19] AT&T failed to demonstrate that it even attempted to obtain a new arrangement under the 2011 Order. AT&T's failure of proof on this threshold issue should preclude it from obtaining any relief under the 2011 Order.

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[16] AT&T's Opposition at 11.

[17] *See, e.g.*, AT&T's Complaint at ¶¶ 31-33; AT&T's Reply at ¶ 8, 13, 21, 28, 31.

[18] *See* DEP's Petition at 6-8.

[19] 2011 Order, 26 FCC Rcd at 5335-36, ¶ 216.

Finally, in response to DEP's argument that AT&T is contractually barred from rate relief because it failed to satisfy the JUA's written notice requirement, AT&T argues:

> Duke Progress claims that AT&T was contractually required to request negotiations sooner under Article XIII.D of the JUA, which states that "[e]ither party may make a request for review of the pricing methodology and the costs set forth in the Exhibits to this Agreement no sooner than at five (5) year intervals." The JUA rental rate formula, however, is in Article XIII.C of the JUA, so is not a "pricing methodology [or] cost[] set forth in the Exhibits" to the JUA.[20]

AT&T's argument ignores that the JUA explicitly—and in the very next subsection—makes clear that "pricing methodology" refers to the "**annual rental** or the attached Exhibits B and D."[21] There is no plausible interpretation of the JUA that would exempt "rate" renegotiations from Article XIII.D's written notice requirement.

II. The Record and the Commission's "Cost Causation" Principles Require that AT&T Bear the Cost of the Safety Space on DEP's Poles.

The communication workers safety zone (a/k/a/ "safety space") exists, as its name implies, to protect communication workers. Without communications attachments, this 3.33 feet (40") of space is unnecessary on DEP's poles. Similarly, without electric facilities, this space is unnecessary on AT&T's poles. Because of this, the parties have always **shared** the cost of this space pursuant to the JUA. The Commission's current rate formulas, which were developed entirely during an era where cost-sharing arrangements within joint use agreements were undisturbed, do not account for the safety space. Because of this, DEP argued that the 3.33 feet of safety space on jointly used poles owned by DEP should be allocated to AT&T under the Old Telecom Rate (and vice versa on AT&T poles).[22] In support of this argument, DEP explained,

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[20] AT&T's Opposition at 11 n.52.

[21] *See* DEP's Answer at Exh. 1, DEP000129 (JUA, Art. XIII.E) (emphasis added).

[22] *See, e.g.,* DEP's Answer at ¶ 25; DEP's Initial Brief in Response to the Enforcement Bureau's March 8, 2021 Letter at 21-22 (filed Apr. 8, 2021) ("DEP's Initial Brief"); DEP's Petition at 9-10.

inter alia, that: (1) AT&T was the original the "cost causer" of the safety on DEP's poles; and (2) DEP does not need and does not use the safety space on its own poles.[23]

The Bureau rejected DEP's argument, stating: "[B]ecause AT&T's attachments do not occupy the safety space, Duke may not charge AT&T for that space."[24] In its Petition, DEP pointed out several flaws in the Bureau's finding, including that it: (1) fails to address DEP's "cost causation" argument; and (2) relies solely on prior Commission precedent without considering the record evidence that clearly distinguishes that precedent from the facts at issue in this proceeding—i.e., namely that DEP does not need and does not use the safety space on its own poles.[25] In an attempt to rebut DEP's cost-causation argument, AT&T argues that DEP's "claim is dispelled by the nature of its facilities, which require the space, and Duke Progress's use of the space for streetlights."[26] To the extent AT&T is arguing that the "nature of DEP's facilities" caused the need for the safety space, this argument only applies to the safety space on AT&T's poles—**on DEP's poles, it is the presence of communications attachments (or, more specifically, their workers) that necessitates this space**. Furthermore, the "occasional" and non-essential installation of streetlights within the safety space hardly establishes that the safety space on DEP's poles "is usable and used by" DEP.[27]

AT&T also argues that the safety space on DEP's poles cannot be allocated to AT&T

[23] *See* DEP's Answer at ¶ 25; DEP's Initial Brief at 9-10, 21-22.

[24] Order at ¶ 51.

[25] *See* DEP's Petition at 9-10.

[26] AT&T's Opposition at 13 n.60.

[27] *See* DEP's Answer at Exh. A, DEP000252-53 (Decl. of Scott Freeburn, Nov. 13, 2020, ¶ 18) (explaining that, while "streetlights are occasionally mounted within the safety space," "the safety space is not necessary for the proper installation of a streetlight," and streetlights "can be, and often are, safely mounted within the electric supply space on DEP's poles"); *id.* at Exh. C, DEP000297 (Decl. of Steven Burlison, P.E., Nov. 13, 2020, ¶ 9) (explaining that "safety zone is not necessary for the proper installation of a streetlight").

because "Commission rules...permit a utility to charge attachers *only* for the physical space occupied by their attachments."[28] AT&T's argument presumes a definition of the term "occupied" that does not exist. The Commission's regulations already presume, for example, that a CATV or CLEC wireline attachment "occupies" 1-foot of space.[29] This presumption is based in part on the standard 12" clearance requirement between communications attachments.[30] In other words, the clearance requirements necessitated by an attachment are part of the space "occupied." Here, the 40" clearance requirement is part of the space "occupied" by the communications attachments on DEP's poles. If the Bureau dismantles the JUA's cost-sharing methodology, then the cost of the safety space should be allocated (a) equally among all communications attachers, or (b) to AT&T as the original cost-causer.[31] Otherwise, DEP and its electric ratepayers end-up bearing the **entire** cost of space they do not use, do not need and would not have built for purposes of electric service.[32]

III. The Bureau Erred by Rejecting DEP's "Avoided System Replacement Costs" Valuation.

The JUA provides AT&T with the right to remain attached to DEP's poles following termination.[33] According to DEP's valuation expert, this right provides AT&T with an annualized net benefit of [redacted] per pole.[34] While the Bureau found that this right provided AT&T with a

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[28] AT&T's Opposition at 12 (emphasis in original) (citations omitted).

[29] *See* 47 C.F.R. § 1.1410.

[30] *See* National Electrical Safety Code (NESC), IEEE Standards Association, Rule 235H (2017).

[31] If the Bureau allocates this cost to AT&T, as it should, then DEP would expect to bear this cost on jointly used poles owned by AT&T.

[32] *See Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-151, 13 FCC Rcd 6777, 6818 at ¶ 91 (Feb. 6, 1998) ("Where use of the one foot presumption would not encourage just and reasonable rates, any party may rebut the presumption.").

[33] *See* DEP's Answer at Exh. 1, DEP000130 (JUA, Art. XVII.B).

[34] *See id.* at Exh. E, DEP000333-34, DEP000361 (Decl. of Kenneth Metcalfe, CPA, CVA, Nov. 12, 2020, ¶¶ 18-21, Exh. E-2).

material advantage over DEP's CATV and CLEC licensees, the Bureau rejected DEP's valuation because: (1) it "assumes that AT&T would incur the costs of a duplicate network, plus other costs, in arriving at this figure,"[35] and (2) "[t]he Commission has never condoned valuing an alleged advantage by assuming that, without the JUA, an [ILEC] would have built a duplicate pole network."[36]

In its Petition, DEP explained why the Bureau's finding was neither correct nor relevant.[37] AT&T's opposition to this point, which merely regurgitates the Bureau's finding, argues that DEP's "redundant network theory is contrary to precedent" and that the "Commission has never condoned valuing an alleged advantage by assuming that, without the JUA, an [I]LEC would have built a duplicative pole network."[38] But if DEP cannot value AT&T's right to remain attached following termination using an "avoided system replacement costs" methodology, then how should this material benefit be evaluated? This question is particularly important given that the Bureau and both parties acknowledge that, in the absence of AT&T's contractual right to remain attached, AT&T's next best alternative is to deploy its own poles.[39] Merely insisting "that would never happen" is not a legitimate legal rationale.

IV. The Bureau Erred by Failing to Account for the Enormous Value AT&T Derives from the "Tabulated Costs" Provision of the JUA.

In its Petition, DEP argued that the "Bureau all but dismissed the enormous value AT&T derives from the 'tabulated cost'...provision of the JUA, pursuant to which AT&T pays [redacted]

[35] Order at ¶ 45 n.152.

[36] *See id.* at ¶ 44.

[37] *See* DEP's Petition at 13-15.

[38] *See* AT&T's Opposition at 18 (citations omitted).

[39] *See* Order at ¶ 39 & n.130 (citing DEP's "avoided system replacement costs" valuation and noting that "AT&T's alternative to the JUA [is] far costlier"); *see also* AT&T's Opposition at 19 (acknowledging that DEP's valuation demonstrates that "AT&T's alternative to the JUA is far costlier") (citations omitted).

[redacted] of the actual costs DEP incurs in performing pole replacements on AT&T's behalf."[40] DEP explained that the Bureau's confusion over whether "equipment transfer costs are included in Duke's average cost estimate or in the Exhibit B scheduled cost for a pole replacement"[41]—i.e., the sole reason for the Bureau's "non-finding" on this issue—is unfounded.[42] Specifically, DEP pointed to Scott Freeburn's testimony explaining that—for the same scope of work—AT&T is only required to pay [redacted] for a pole replacement, whereas DEP's CATV and CLEC licensees are required to pay (on average) [redacted], which represents DEP's "actual work order cost" of performing a pole replacement.[43] DEP also pointed to the black letter of the JUA, which clearly insulates AT&T from the cost of transferring DEP's facilities to a new pole—e.g., "[E]ach party shall place, maintain, rearrange, transfer and remove its own Attachments at its own expense...."[44]

AT&T's Opposition completely sidesteps DEP's argument. AT&T did not address the fact that Mr. Freeburn's comparison of "tabulated costs" and "actual work order costs" for pole replacements is predicated on the same scope of work. AT&T also failed to address the JUA's requirement that each party bear its own equipment transfer costs. AT&T's silence with respect to the JUA is telling, as this language directly undermines the sole basis of the Bureau's "non-finding."[45] Instead of addressing DEP's argument (i.e., that AT&T does not bear the cost of transferring DEP's facilities to a replacement pole), AT&T argues that DEP "creates an artificial difference by comparing the lowest cost pole replacement under the JUA to Duke Progress's

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[40] DEP's Petition at 11.

[41] Order at ¶ ¶ 26.

[42] *See* DEP's Petition at 11-13.

[43] *Id.* at 11-12 (quoting DEP's Answer at Exh. A, DEP000256 (Freeburn Decl. ¶ 24)).

[44] *Id.* at 12 (quoting DEP's Answer at Exh. 1, DEP000122 (JUA, Art. VI)).

[45] *See* Order at ¶ 26 ("Because the record does not indicate the extent to which equipment transfer costs are included in Duke's average cost estimate or in the Exhibit B scheduled cost for a pole replacement, we make no finding with respect to Duke's claim that the average cost advantage to AT&T is {[redacted]}.").

average cost to replace poles of all heights *and* to complete all associated work."[46] This argument is particularly unavailing because it is nothing more than a recitation of the "misleading innuendo" that DEP specifically challenges in its Petition.[47]

Under the "tabulated costs" provision, DEP **incurs**, on average, [redacted] every time DEP performs a pole replacement for AT&T.[48] If AT&T were to request [redacted] replacements of DEP poles in a given year (i.e., [redacted] of the 148,064 jointly used poles owned by DEP), then DEP would be required to absorb an additional [redacted] in pole replacement costs.[49] The expense to DEP of "tabulated costs" should be specifically addressed, and accounted for, in the applicable rate. The Bureau erred in missing this issue by accepting AT&T's misleading innuendo as fact.

CONCLUSION

For the reasons set forth above, as well as the reasons previously stated in DEP's Petition, answer, declarations, documentary evidence and briefing, DEP respectfully urges the Bureau to reconsider the portions of its September 21, 2021 Order described in DEP's Petition.

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[46] AT&T's Opposition at 20.

[47] *See* DEP's Petition at 12 (characterizing AT&T's witness testimony as "misleading innuendo" because it implies that AT&T "pays equipment transfer costs in addition to tabulated costs"). AT&T also argues in a footnote that DEP's "tabulated costs" argument is "one-sided" because it "ignor[es] the offsetting costs AT&T incurs by performing work to accommodate Duke Progress under the JUA." AT&T's Opposition at 20 n.102. There are two glaring problems with this argument. First, AT&T **does not** perform pole replacements on DEP's behalf. Second, AT&T failed to produce any evidence showing its alleged "offsetting" pole replacement costs. At least for the period governed by the 2011 Order, the burden of proof is on AT&T to demonstrate these "offsetting costs." *See Verizon Florida Decision*, 30 FCC Rcd at 1149-50, ¶ 24.

[48] *See* DEP's Petition at 11-12.

[49] [redacted] *See* DEP's Opposition to AT&T's Application for Review at 23-24 (filed Nov. 5, 2021).

Dated: November 8, 2021

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RULE 1.721(m) VERIFICATION

I, Eric B. Langley, as signatory to this submission, hereby verify that I have read this Reply to AT&T's Opposition to DEP's Petition for Reconsideration and, to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.

/s/ Eric B. Langley
Eric B. Langley

CERTIFICATE OF SERVICE

I hereby certify that on this day, November 8, 2021, a true and correct copy of Duke Energy Progress, LLC's Reply to AT&T's Opposition was filed with the Commission via ECFS and was served on the following (service method indicated):

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